WONG KIM WOON

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CRIMINAL APPEAL NO: 42-36-98]
12 OCTOBER 1998

CRIMINAL PROCEDURE: *Bail - Revocation of - Principles applicable - Whether considerations are the same regardless whether bail mandatory or discretionary - Whether accused must be given opportunity to be heard as to why bail should not be cancelled or revoked*

CRIMINAL PROCEDURE: *Bail - Revocation of - Jurisdiction of Sessions Court - Whether power to revoke bail is based on exercise of inherent jurisdiction - Whether Sessions Court may order revocation of bail*

CRIMINAL PROCEDURE: *Bail - Bailable offence - Penalty for offence amended but First Schedule not amended - Whether offence ought to be treated as non-bailable - Penal Code, s. 420*

CRIMINAL LAW: *Penal Code - Section 420 - Bailable offence - Penalty for offence amended but First Schedule not amended - Whether offence ought to be treated as non-bailable*

CRIMINAL PROCEDURE: *Bail - Revocation of - Breach of bail order - Whether bail must continue to be offered despite previous breach of bail order - Criminal Procedure Code, s. 387(i)*

The appellant was charged with four counts for offences under s. 420 of the Penal Code. He was granted bail but failed to attend court on various dates fixed for hearing, submitting medical certificates instead. The Sessions Court eventually ordered the revocation of bail and it was against this that the appellant appealed.

The prosecution submitted that the offence under s. 420 of the Penal Code should be treated as a non-bailable offence because of the following reason. The scheme of the Criminal Procedure Code ('CPC') suggests that offences for which the penalty is more than seven years' imprisonment are non-bailable offences and the penalty under s. 420 of the Penal Code, originally a maximum of seven years' imprisonment, had been amended to a minimum of one year and not more than ten years.

The appellant, submitted that the Sessions Court, regardless of the previous breach of the terms of bail by the appellant, must grant bail to the appellant, albeit on enhanced terms. This was based on the following two contentions. Firstly, the Sessions Court has no inherent jurisdiction of its own and must rely on statute for authority and, secondly, the CPC does not provide for revocation or cancellation of bail which is mandatory under s. 387 of the CPC.

Held:

[1] Even if it appears that the legislature intends to make an offence non-bailable, a *casus omissus* may not be supplied or created since the First Schedule to the CPC is express and clear, and it is not shown that adherence to the express language and meaning results in a manifest absurdity, futility or injustice, or an absurd anomaly. While it does appear anomalous that an offence under s. 420 of the Penal Code is bailable, it cannot be said to be absurd.

[2] Section 387 of the CPC makes it mandatory to offer bail in bailable offences. It is only if there is evidence that the accused is interfering with witnesses or is conducting himself in such a way as to put a fair trial at jeopardy, that the question of revoking or cancellation of bail arises for consideration. But a consideration of whether bail already granted ought to be revoked or cancelled is entirely different from and is distinguishable from the granting of bail.

[3] Whether bail is mandatory or discretionary, the issue where bail has been breached is not the original offence with which the person has been charged, but the breach of the terms of a court order for bail or the abuse of the privilege. The fact that bail for the original offence is mandatory is irrelevant.

[4] The CPC does not provide for the cancellation or revocation of bail. The primary objective of bail is to ensure attendance. Where there has been a breach of the terms of the bail, there cannot be any other consequence consistent with due administration of justice than that bail be ended, whether by revocation or cancellation. It cannot be said there is an exercise of an inherent jurisdiction. There is no contravention of s. 387 of the CPC since bail has been granted, and a cancellation or revocation is simply a consequence of a breach of its terms. Specific statutory power to cancel or revoke bail in such circumstances is unnecessary.

[5] The considerations when revoking or canceling bail are the same regardless of whether bail is mandatory or discretionary in the first instance. The proper course in the event of a breach of an order for bail is to issue a warrant of arrest. When arrested and brought before the court, the accused must be given the opportunity to be heard as to why the bail granted to him should not be cancelled or revoked. The fact he has breached the bail order is *prima facie* a valid reason for cancellation or revocation, unless he has a good explanation. A satisfactory explanation must be in the nature of an *actus me invito factus, non est meus actus* (an act done by me against my will, is not my act), that is, why he was prevented from attending. A medical certificate on itself is not an authority to overrule a court order to attend court unless it specifically states that the patient must stay in bed.

[6] The appellant was not given an opportunity to be heard before his bail was revoked or cancelled. To that extent the revocation or cancellation was bad in law.

[Appeal dismissed; Sessions Court to hear submissions as to why bail should not be revoked or cancelled.]

Case(s) referred to:
Curtis v. Stovin [1889] 22 QBD 512 ***(foll)***
Datuk Yong Teck Lee & Ors v. PP [1996] 2 CLJ 413 ***(foll)***
Emperor v. Jiwan Lal Gauba AIR [1936] Lah 730 ***(refd)***
Ex parte Welchman [1897] 11 Ch D 48 ***(foll)***
Grundt v. Great Boulder Proprietary Gold Mines [1947] 2 All ER 439 ***(foll)***
Hawtrey v. Beaufront Ltd [1946] KB 280 ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458 ***(refd)***
Mohd Jalil Abdullah & Anor v. PP [1996] 5 MLJ 564 ***(not foll)***
PP v. Phang Yong Fook [1988] 1 MLJ 267 ***(foll)***
PP v. Wee Swee Siang [1948] MLJ 114 ***(dist)***
R v. Lim Kwang Seng & Ors [1956] MLJ 178 ***(foll)***
R v. Mansel Jones [1889] 23 QBD 29 ***(foll)***
Salomon v. Salomon [1897] AC 22 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 387(i), 394
Penal Code, s. 420

Other source(s) referred to:
Hamid's Criminal Procedure, p 861

For the appellant - Ng Aik Guan; M/s Ng Aik Guan & Co
For the respondent - Ahmad Rosli Mohd Sham DPP

Reported by Cindy Chan

JUDGMENT

Abdul Wahab Patail J:

This is an appeal against the decision of the learned judge of the Sessions Court on 14 August 1998 revoking the bail granted to the appellant. After hearing submissions, I had dismissed the appeal, and ordered the judge of the Sessions Court to hear submissions as to why bail should not be revoked or cancelled. My reasons are as follows.

The appellant had been charged with four counts for offences under s. 420 of the Penal Code (FMS Cap. 45). He was granted bail in the sum of RM150,000. On various dates fixed for hearing the appellant did not attend court, submitting medical certificates for various ailments. It was conceded by his own counsel on 14 August 1998 before the court that the appellant "telah melarikan diri".

It was argued by the Deputy Public Prosecutor that the scheme of the CPC suggests that offences for which the penalty is more than seven years' imprisonment are non-bailable offences, that the penalty under s. 420 of the Penal Code, originally a maximum of seven years' imprisonment, has been amended to make it a minimum of 1 year imprisonment and not more than 10 years. Thus, the offence under s. 420 of the Penal Code should be treated as a non-bailable offence.

What is being urged would require a judicial amendment of the First Schedule of the Criminal Procedure Code (FMS Cap 6) (the CPC), ignoring the fact that the legislature itself did not make amendment to the First Schedule of the CPC to make the offence non-bailable. It has been held in *R v. Mansel Jones* [1889] 23 QBD 29, 32 that it is not competent for a judge to modify the language of an Act. Particularly where the language is clear, the Court cannot speculate on the intention of the legislature (*Salomon v. Salomon* [1897] AC 22, 38), and the court must give effect to the language. Even if it appears that the legislature intends to make the offence non-bailable, a *casus omissus* may not be supplied or created (*Ex parte Welchman* [1897] 11 Ch D 48), since the First Schedule to the CPC is express and clear, and it is not shown that adherence to the express language and meaning results in a manifest absurdity, futility or injustice, or an absurd anomaly (*Grundt v. Great Boulder Proprietary Gold Mines* [1947] 2 All ER 439). While it does appear anomalous that an offence under s. 420 of the Penal Code be bailable, it cannot be said to be absurd.

Section 387(i) of provides:

> 387 When person may be released on bail
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> (i) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail by any police officer in charge of a police station or by any police officer not under the rank of Corporal or by such Court.

The words "shall be released on bail", given its literal and natural meaning, means that bail must be offered. This has been so held in *R v. Lim Kwang Seng & Ors* [1956] MLJ 178. In *Mohd Jalil bin Abdullah & Anor v. Public Prosecutor* [1996] 5 MLJ 564, Nik Hashim JC (as he then was), held that bail is mandatory under s. 387. I respectfully agree with these views.

Mr. Ng Aik Guan, for the appellant, has urged with erudition a novel point of law, that since (i) the Sessions Court has no inherent jurisdiction of its own (*Karpal Singh & Anor. v. PP* [1991] 2 CLJ 1458; [1991] 2 MLJ 544; *Datuk Yong Teck Lee & Ors. v. PP* [1996] 2 CLJ 413; [1996] 2 MLJ 68), and must rely on statute for authority, and (ii) that the CPC does not provide for revocation or cancellation of the bail which is mandatory under s. 387 of the CPC, the learned judge of the Sessions Court, regardless of the fact that the appellant had previously breached the terms of his bail, must grant bail to the appellant, albeit on enhanced terms.

The argument as to the jurisdiction is well founded. Since this is an appeal from the decision of the Sessions Court under s. 394 of the CPC, and not an originating application to the High Court for bail, this appeal must be confined to the correctness of the decision of the Sessions Court.

Mr. Ng Aik Guan relied upon *Mohd Jalil bin Abdullah & Anor v. Public Prosecutor* to support his argument that bail must be granted despite breach by the appellant. In that case, the hearing of the case had to be postponed several times on grounds mainly that either the first or the second applicant or both of them were absent. Bail was increased twice and the case was finally fixed for hearing on 21 May 1996. On that date, both applicants were again absent, and warrants for their arrest were issued. The applicants surrendered. The first applicant explained with a medical certificate that he was ill, and the second applicant that he had mistaken the date. The learned Sessions Court judge, not satisfied with the explanations, revoked the bail and committed both to custody. The High Court in Kota Bharu, upon the issue whether the learned Sessions Court judge was right to revoke the bail held:

> The Court could well understand the frustration of the learned magistrate in dealing with these applicants. The record shows that they have abused the bail as an excuse not to attend Court. The learned magistrate was right in issuing warrants of arrest against the applicants, and a show-cause notice to the bailor for their absence. He was also right when he gave the applicants an opportunity to be heard before he proceeded to revoke the bail: *Phang Yong Fook v. PP* [1988] 1 MLJ 267. But he was wrong when he ordered them to be remanded. This practice is illegal and not in compliance with the law: *Hamid's Criminal Procedure* at p. 861.

With respect, *Hamid's Criminal Procedure* at p. 861 only said:

> In practice, the Subordinate Courts refuse to grant bail in 'bailable offences' on the ground that there are sufficient reasons to show the accused will put a fair trial into jeopardy. This practice is illegal and not in compliance with the law.

Section 387 of the CPC makes it mandatory to offer bail in bailable offences. To refuse to offer bail on the ground that the accused will put a fair trial into jeopardy, is contrary to s. 387 where bail is mandatory. The correct practice in bailable offences is to offer bail, and if there is evidence that the accused is interfering with witnesses or is conducting himself such as would put a fair trial into jeopardy, then only the question of revoking or cancellation of the bail arise for consideration.

But a consideration of whether bail already granted ought to be revoked or cancelled is entirely different from and is distinguishable from the granting of bail. A court order granting bail is an order of the court. That an order of the court, unless set aside, be ignored or disobeyed with impunity, is wholly alien to the due administration of justice. It would be contrary to public policy and the public interest as it would lead to a breakdown of the rule of law. It has been said, in respect of non-bailable offences in *Emperor v. Jiwan Lal Gauba* AIR [1936] Lah 730 that:

> The granting of bail in a non-bailable offence is a concession allowed to an accused person and it presupposes that this privilege is not to be abused in any manner. It is a sort of trust reposed in him by (the) Court and if it is found that he has betrayed this trust in any manner or that he has misused the liberty thus granted to him by Court, he disentitles himself to the privilege so granted.

Whether the bail is mandatory or discretionary, the issue where bail has been breached is not the original offence with which the person has been charged, but the breach of the terms of a court order for bail. Even if the privilege of bail is mandatory, the issue is breach or abuse of the privilege. In other words, the fact that bail for the original offence is mandatory is irrelevant. To allow otherwise would be to condone the breach of bail terms

in cases where bail is mandatory, leading to a flood of such breaches. To accept the argument that bail must be given after mandatory bail is breached would turn the administration of justice into a byword for ineptitude.

The Criminal Procedure Code does not provide for the cancellation or revocation of bail. *PP v. Wee Swee Siang* [1948] MLJ 114 is not authority to do so in cases where bail is mandatory since the case relates to a non-bailable offence. Revocation and cancellation, it was argued, cannot be based on inherent jurisdiction since in any case the lower courts do not have powers of inherent jurisdiction. *Karpal Singh & Anor v. PP* [1991] 2 MLJ 544 SC and *Datuk Yong Teck Lee & Ors v. PP* [1996] 2 MLJ 68 CA are authority for the general proposition that the subordinate courts do not have inherent jurisdiction.

PP v. Wee Swee Siang was not a case involving revocation or cancellation of bail. It was a case involving the refusal to grant bail. In my view, there is no question of the lower court relying on inherent power. Bail had in this case been granted. It cannot be, and has not been, suggested that where bail is mandatory, but that the person refused to execute the bail bond, he is still to be released. The bond is a fundamental aspect of bail. The primary objective of bail is to ensure attendance. Where there has been a breach of that fundamental term of the bail, there cannot be any other consequence consistent with due administration of justice than that bail be ended, whether by revocation or cancellation. It cannot be said there is an exercise of an inherent jurisdiction. There is no contravention of s. 387(i) of the CPC since bail had been granted, and a cancellation or revocation is simply a consequence of breach of its terms. Specific statutory power to cancel or revoke bail in such circumstances is unnecessary.

While the considerations in granting and revocation or cancellation are different, the revocation or cancellation of bail, regardless whether the bail is mandatory or discretionary in the first instance, are the same. But that is not to say that a cancellation or revocation is to be taken lightly or as mere formality. The general principle was stated in *PP v. Phang Yong Fook* [1988] 1 MLJ 267, Zakaria Yatim J (as he then was), distinguishing *PP v. Wee Swee Siang* [1948] MLJ 116, said:

> The considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses. Even when evidence is adduced in

support of an application to cancel the bail granted to an accused person, the Court should not allow the application without giving the accused person an opportunity to be heard first.

The appellant in this case failed to attend court on the date of hearing. The proper course in the event of such a breach of an order for bail, is to issue a warrant of arrest. When arrested and brought before the court, he must be given an opportunity to be heard as to why the bail granted to him should not be cancelled or revoked. The fact he had breached the bail order is *prima facie* a valid reason for cancellation or revocation, unless he has a good explanation. Generally, such explanation must be in the nature of why he is unable to attend court. A person who is sick but able to go to see a doctor is not necessarily unable to attend court. A 'medical certificate', unless it specifically states the patient must stay in bed, merely purports to recommend medical leave primarily that such person would be unable to work. It does not necessarily mean he cannot attend court. He may be able to attend, if only to ask for a postponement of the hearing. A medical certificate of itself is not an authority to overrule a court order to attend court. A satisfactory explanation must be in the nature of an *actus me invito factus, non est meus actus,* (an act done by me against my will, is not my act), that is, why he was prevented from attending.

The next question, although not entirely relevant in this case, is whether the Sessions Court is obliged to extend fresh bail after the breach of the earlier bail, albeit on perhaps enhanced terms. The Criminal Procedure Code provided for the grant of bail, but is silent as to the consequences of its breach. While it is an accepted principle that bail may be granted at any stage, it is in my considered opinion, manifestly absurd to suggest that s. 387(i) intends that bail must continue to be offered despite previous breach. A statute, even more than a contract, must be construed, *ut res magis valeat quam pereat,* so that the intentions of the legislature may not be treated as vain or left to operate in the air: *Curtis v. Stovin* [1889] 22 QBD 512, 517, *Hawtrey v. Beaufront Ltd* [1946] KB 280. It cannot be the intention of Parliament that bail could be abused and yet further and fresh bail must be extended. Sense is to be made if possible in interpretation of a statute. That sense is only made that bail is mandatory to be offered once under the section, the continuation of that bail must be based upon continued compliance of its terms, and the withdrawal of it if it is breached. The interpretation urged upon the court, on the other hand, makes s. 387(i) vain and operating in the air: the legislature might as well have provided that no person be held in custody pending trial in respect of such offences.

It does not appear in this case the appellant had been given an opportunity to be heard before his bail was revoked or cancelled. To that extent the revocation or cancellation is bad in law. I had therefore ordered that the Sessions Court hear the appellant as to why bail should not be cancelled or revoked. Evidence may be received as necessary.

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